United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,736

SINCLAIR REFINING COMPANY, *Appellant*

v.

JAMES C. TOOMEY AND JOHN J. TOOMEY, Trustees under the Estate of Ellen C. Toomey, deceased, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. When the uncontradicted evidence revealed that a landowner caused a nuisance to be created, and that the only charge made against his lessee was of non-feasance in failure to take steps to correct or improve the situation, should the trial court have granted indemnity to the lessee by reason of the fact that the law requires such indemnity in favor of one who is exposed to liability by reason of a condition which is actually, actively or primarily created by another and whose only wrong is the failure to remedy it?

2. Would true justice be better served by an inquiry into the relative guilt of tort feasors who bear a common responsibility to injured third persons when public policy considerations do not preclude such inquiry, than by holding all tort feasors equally responsible as between themselves?

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No. 17,736

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v.

JAMES C. TOOMEY and JOHN J. TOOMEY, Trustees under the Estate of ELLEN C. TOOMEY, deceased, *Appellees.*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia initially had jurisdiction pursuant to the provisions of Title 11-306, District of Columbia Code, 1951 Edition. A final judgment dismissing the cross-claim of defendant, Sinclair Refining Company, against defendants, James C. Toomey and John J. Toomey, was entered January 30, 1963. (J.A. 18) Notice of appeal was filed February 25, 1963. (J.A. 18) This Court has jurisdiction pursuant to the provisions of Title 28 U.S.C.A., § 1291.

STATEMENT OF CASE

This case was commenced by the filing of a complaint by Virginia Warren, now Virginia Warren Daly, on July 10, 1959, against defendants James C. Toomey and John J.

Toomey, Trustees under the estate of Ellen C. Toomey, deceased; Sinclair Refining Company; and others. (J.A. 2) In the complaint plaintiff charged that she fell into a stairwell which had been maintained for an unknown period of time in a negligent manner because it was unlighted and unguarded. She did not charge any of the defendants with active negligence. With its answer, defendant Sinclair Refining Company filed a cross-claim against defendants James C. Toomey and John J. Toomey. (J.A. 3-5) That cross-claim was based upon the contention that those defendants constructed, or were responsible for the construction of, the condition complained of by plaintiff and that by virtue of their active negligence in this regard defendant Sinclair Refining Company contended that the defendants Toomey were required to indemnify it for any damages which it might be called upon to pay because of its relationship to the plaintiff as an intermediary lessee-lessor of the property. (J.A. 4-5) At the pre-trial proceeding held January 31, 1962, plaintiff was required to be more specific in her factual allegations as were the respective defendants. She claimed that the defendants, and each of them, "... maintained an unlighted stairwell under circumstances reasonably requiring lighting; maintained an uncovered stairwell immediately adjacent to a public way without notice or warning sign; failed to mark the dividing line between the public space and the ... property ... and ... maintained a hazardous condition, constituting a latent and concealed defect, to wit, the stairwell." (J.A. 9) In this pre-trial proceeding defendant, Sinclair Refining Company, reasserted its cross-claim for indemnity against the defendants Toomey, stating as a factual basis therefor that if the plaintiff's allegations were true, the condition complained of was the result of the active negligence of the defendants Toomey, who, as owners of the property, were responsible for the construction of the stairwell without railings, cover or other protective devices.

The case came on for trial upon the basis of these allegations and it was stipulated by and between all counsel that the issues joined in the cross-claims were to be tried to the court without a jury, the decision to be made on the basis of the evidence heard by the court during the presentation of the plaintiff's jury trial (without regard to the jury's findings in that case[1]), together with whatever admissible evidence the parties to the cross-claim might choose to introduce thereafter. After the jury trial, by Memorandum Opinion dated January 10, 1963, the trial court stated certain facts. (J.A. 14) Since there is no need to dispute them for the purposes of the appeal on this cross-claim, they are referred to herein without record citation to the places in the transcript where the testimony supporting them appears.

> Before the incident giving rise to this suit, plaintiff and her escort had attended a night baseball game . . . .Their route took them along a city street until they reached a public alley . . . . They turned from the sidewalk of this street into the alley . . . . walked a short distance . . . stepped to her left . . . . took several steps forward, fell into a stairwell from the side thereof and was injured. The stairwell led from the alley to the basement of a building . . . . The side of the building did not extend to the alley but was several feet back of it, thereby giving room for the stairwell. It was not covered, had no warning signs on it, and no guard rail above and at its side . . . . The stairwell had existed in the same condition for many years and long prior to the leaseholds . . . . The owners of the property in question were the defendants Toomy. They were trustees of the estate of Ellen C. Toomey, who acquired the property at the turn of the century . . . . In the early thirties the owners remodeled the property, the original building of which had been used as a Civil War prison, and converted it into a gasoline station . . . . (J.A. 14-15)

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1 There was no understanding that the court was to treat the jury verdict as advisory.

The remainder of the trial court's opinion dealt with and stated the proposition that in its view each of the defendants were liable to the plaintiff and that insofar as the plaintiff's claim was concerned they could not exonerate themselves by attempting to throw the onus of blame on another defendant. (J.A. 15)

As previously stated, the specific charges of negligence were to the effect that the defendants were negligent at the time of the accident in maintaining an unlighted stairwell, an unguarded stairwell, an uncovered stairwell, and a stairwell without warning signs. (J.A. 9) The trial court held that liability could be found against all defendants if it was based upon acceptance of plaintiff's contention that a nuisance existed by reason of the fact that there was no guard rail, no warning sign, or no cover over the stairwell, because these conditions existed prior to the owner's lease of that portion of the property to defendant Sinclair Refining Company and remained unchanged during the terms of the leases to Sinclair Refining Company and to defendant William T. Muldrow and to the date of the fall of plaintiff into the stairwell. (J.A. 23-26) He held that if liability was predicated instead upon the lack of lighting, the defendant William T. Muldrow would be liable solely, because the control of the light fixtures was in the hands of that defendant and not under the control of the Toomeys or the Sinclair Refining Company. (J.A. 26) The court's views on this issue were even further clarified in its charge to the jury and in the court's remarks thereafter. (J.A. 23-26)

With the case in this posture and in the light of the court's opinion, defendant Sinclair Refining Company tendered a request for a finding of fact that "Defendants James C. Toomey and John J. Toomey, Trustees, created or caused to be created a stairwell on said private property." and asked the court to conclude therefrom that defendant Sinclair Refining Company was entitled to indemni-

fication from defendants James C. Toomey and John J. Toomey by reason of the fact that the active or primary negligence of those defendants created the condition complained of by plaintiff which led to the liability subsequently imposed upon all defendants. (J.A. 13) The trial court refused the indemnity sought and rejected the proposed finding of fact. As a matter of fact the trial court refused to make any finding on that issue and instead erroneously concluded as a matter of law that "There is no direct evidence as to who created the condition and there is no primary or basic liability involved." (J.A. 16-17) Upon the basis of that statement the court below denied the cross-claim of defendant Sinclair Refining Company for indemnity against defendants James C. Toomey and John J. Toomey. This appeal followed. (J.A. 18)

The conclusion stated by the court that "There is no direct evidence as to who created the condition . . . ." is clearly erroneous. As a matter of fact it is even contrary to the court's own written opinion. The only person who testified about the history of the property and its condition prior to the lease by the Toomeys to the Sinclair Refining Company was the defendant John J. Toomey.[2] Defendant John J. Toomey testified that the original structure on the property owned by the Toomey family at Georgia Avenue and V street was a frame building, (J.A. 19) which went back only about one-half way on the lot. (J.A. 19) The first additional structure built by the Toomeys was a lubrication shed on the west side of the alley (This was not the building which contained the stairwell.) (J.A. 19), however, subsequently the main building was built as a new building. (J.A. 19) The first occupant in 1931 was a Mission Service Station. The premises have been used as

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2 It is impossible to give a direct citation to a negative statement, however, this appellant is certain that if any other party contends that there was additional testimony on this issue they will make that contention known to the court.

a service station ever since. (J.A. 20) The stairwell was built when the new building was constructed. It was built without a guard rail or cover and it was maintained in that condition up to the time of the accident. (J.A. 19, 22) Prior to the lease to Sinclair Refining Company, the Toomey family had leased that portion of the premises to various gas station operators. (J.A. 20) The entire property was not leased to defendant Sinclair Refining Company. There were other leases of other portions of the property located at this address and the entire property was under the active management of defendant John J. Toomey. (J.A. 20-21) He exercised the exclusive judgment insofar as ownership of the premises is concerned. (J.A. 22)

The judgment denying the cross-claim of defendant Sinclair Refining Company for indemnity against defendants James C. Toomey and John T. Toomey, therefore, is based upon a factual finding which is clearly erroneous, to wit that: "There is no direct evidence as to who created the condition . . . ." The erroneous nature of this factual finding is not disguised by calling it a "conclusion of law" and the judgment based upon it must be reversed.

STATEMENT OF POINTS

1. The trial court erred in dismissing the cross-claim for indemnity of defendant, Sinclair Refining Company, against defendants, James C. Toomey and John J. Toomey, Trustees.

2. The trial court erred in rejecting the uncontradicted testimony of defendant, John J. Toomey, that the defendants Toomey, or their predecessors in interest, created, or caused to be created, a stairwell on the private property involved herein and that said stairwell from the time of its inception existed in the same condition, except for wear and tear, as it existed at the time of the accident.

3. The trial court erred in concluding as a matter of law that there was no direct evidence as to who created the condition and that there was no primary or basic liability involved.

4. The trial court erred in concluding as a matter of law that the defendants stood equally.

5. The trial court erred in denying the cross-claim for indemnity of defendant, Sinclair Refining Company, against defendants, James C. Toomey and John J. Toomey, Trustees.

6. When the uncontradicted evidence revealed that the defendants James C. Toomey and John J. Toomey, Trustees, or their predecessors in interest, either created or caused to be created the condition complained of and that the only charge made against defendant, Sinclair Refining Company, was of non-feasance, to wit: the failure to take steps to correct or improve the situation affirmatively created by defendants, James C. Toomey and John J. Toomey, Trustees, the trial court should have granted indemnity in its favor against defendants, James C. Toomey and John J. Toomey, Trustees, by reason of the fact that the law requires such indemnity in favor of one who is exposed to liability by reason of a condition which is actually, actively or primarily created by another and whose only wrong is the failure to remedy it.

SUMMARY OF ARGUMENT

This appeal presents a factual situation in which Sinclair Refining Company was held liable to an injured third person for having failed to take affirmative action to remedy a negligent condition created by the owners on property which it leased for immediate sub-lease to another. The necessary conclusion which flows from an acceptance of the validity of the jury verdict in favor of the injured third person is that defendants Toomey were clearly guilty of primary and active negligence because

they created the condition which the jury chose to find constituted a nuisance. Defendant Sinclair Refining Company was not even charged with any affirmative act of negligence. In these circumstances true justice would be served by an inquiry into the relative guilt of the defendants.

The applicable authorities support the award of indemnity in these circumstances. As between defendants guilty of mis-feasance on one hand and merely non-feasance on the other, it is the policy of the law to recognize the difference in culpability and to administer justice between them when considerations of public policy do not intervene and when it is clear that one has merely failed to act to prevent the natural and probable consequences of the act of the other.

The trial court failed to recognize these well established legal principles and in addition based the judgment upon a finding of fact which was clearly erroneous. The denial of the claim for indemnity should therefor be reversed.

ARGUMENT

The pleadings and proceedings below demonstrate that a single legal issue is presented by the cross-claim of defendant Sinclair Refining Company against defendants James C. Toomey and John J. Toomey, to wit: when successive possessors of land are held liable to an injured third person by reason of the fact that a nuisance was created and permitted to remain on the land, is the possessor who did nothing to create the nuisance and was exposed to liability only by reason of his failure to abate it, entitled to look to the creator of the nuisance for exoneration.

There is no question but that the liability of defendant Sinclair Refining Company to plaintiff was based upon a factual finding that that company successively maintained a nuisance which had been previously created, because that is the only issue submitted to the jury against that de-

fendant.[3] Under the applicable authorities the trial court should have had no alternative but to grant indemnity in favor of defendant Sinclair Refining Company when the uncontradicted evidence revealed that the defendants James C. Toomey and John J. Toomey, Trustees, or their predecessors in interest, either created, or caused to be created, the condition complained of and that the only charge made against defendant Sinclair Refining Company was of non-feasance, to wit: the failure to take steps to correct or improve the situation affirmatively created by defendants James C. Toomey and John J. Toomey. Apparently the trial court refused to recognize that the law in those circumstances requires indemnity in favor of the party who is exposed to liability by reason of a condition which is actually, actively or primarily created by another and whose only wrong is the failure to remedy it. In furtherance of this refusal to recognize and to accept this principle, the trial court entered a clearly erroneous finding of fact and disregarded a unanimous line of applicable authorities.

As early as 1896, the Supreme Court of the United States approved an award of indemnity in a similar situation. In *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316 (1896), the District of Columbia sued the Washington Gas Light Co. to recover sums it previously had been required to pay to a person who had been injured by stepping into a hole in the public space. The suit by the District for indemnity was based on the theory that the hole had been created by the activities of the defendant Washington Gas Light Co. The Supreme Court held at page 328 that in situations where two or more tort feasors may be liable for injury to a third person ". . . it is not against the policy of the law to inquire into the relative

[3] The jury was not even permitted to consider whether either defendant Sinclair Refining Company, or defendants James C. Toomey and John J. Toomey were guilty of any independent act of negligence, therefore, liability could not have been legally imposed upon any other ground.

delinquency of the parties and to administer justice between them although both parties are wrongdoers." The Supreme Court made it clear that this rule was not limited to situations in which the rights of a municipal corporation is involved by stating at page 328: "Indeed, cases which illustrate the rule and its application to many conditions of fact are too numerous for citation. . . ."

In *Union Stockyards Co.* v. *Chicago, B & Q R.R. Co.*, 196 U.S. 216 (1905), the Supreme Court again reviewed the law of indemnity and particularly its prior decision in the *Washington Gas Light Co.* case and approved the practice of inquiring into the relative guilt of tort feasors who may be liable for an injury to a third person, stating at page 226:

> When two parties, acting together, commit an illegal or wrongful act the party who is held responsible for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such cases the parties are not in *pari delicto* as to each other, though as to third persons either may be held liable.

However, the court in the *Union Stockyards Co.* case was unable to apply the rule of the *Gas Light Co.* case, because the evidence demonstrated that neither tort feasor was guilty of active negligence since the only charge which could be leveled against either of them was the failure to discover a defect which was ascertainable upon reasonable inspection. The Supreme Court also recently restated the propostion that in the proper circumstances the right to indemnity exists in favor of one who is liable secondarily or on the basis of passive tortious conduct against one who is primarily responsible or guilty of active negligence. *Ryan Stevedoring Corp.* v. *Pan-American Corp.*, 350 U.S.

124, 133 (1956). The uniform act covering joint tort feasors also recognizes the propriety of achieving more perfect justice by injuiring into the relative guilt between tort feasors who share a common liability to an injured third person. The Annotated Code of Maryland, 1957 Edition, Article 50 § 21, provides that a finding of joint liability ". . . does not impair any right of indemnity under existing law." See *Park Circle Motor Co.* v. *Willis,* 201 Md. 104, 94 A. 2d 443 (1953).

In *Coates* v. *Potomac Electric Power Co.,* 96 F. Supp. 1019 (D.D.C. 1951), plaintiff was injured under circumstances which would have permitted him to recover from either Potomac Electric Power Co. or the Washington Gas Light Co. The recovery against the Washington Gas Light Co. would have been based upon active negligence in the operation of one of its cranes, whereas the recovery against Potomac Electric Power Co. would have been based upon passive negligence in permitting its wire to sag below a prescribed level. In those circumstances the court stated at page 1021:

> The court therefore concludes that, however, one expresses it—as an implied agreement of indemnity arising from the breach of some duty owed by the primary wrongdoer to the secondary wrongdoer, or indemnity owed the passive wrongdoer by the active wrongdoer, or a claim for consequential damages arising from a separate tort—the amended third party complaint asserts an independent right of action . . . ."

A similar ruling was made in a case involving different facts in *Aetna Cas. & Surety Co.* v. *Porter,* 181 F. Supp. 81 (D.D.C. 1960).

The fact that this principle of law is applicable to this case cannot be doubted in view of the references by the Supreme Court in *Union Stockyards Co., supra,* at page 226, to a situation wherein one defendant is held liable to a third person by reason of a *nuisance* created by another.

The reason for these authorities and their applicability is that there is, and should be, a marked difference between the effects of mis-feasance or mal-feasance on one hand and non-feasance on the other. Even though in most instances the law is to the effect that an injured third person may recover against one who breaches a duty owed him, whether the breach is the result of mal-feasance, mis-feasance or non-feasance, it recognizes in many circumstances that there is a difference in culpability and when public policy does not interfere the law recognizes that true justice is best obtained by permitting several wrongdoers to litigate their relative guilt when they are not in *pari delicto* after they have been held responsible for the injured person's damages.

In this particular case there is no public policy which would prevent an award of indemnity to defendant Sinclair Refining Company against defendants James C. Toomey and John J. Toomey. Title 5-504, District of Columbia Code, 1961 Edition, contains a statutory requirement that the owner of land in the District of Columbia abate any nuisance of the kind herein involved. This section is indicative of the fact that the authorities charged with implementing the building restrictions and regulations look to the owner, rather than to a lessee, in such matters and it would seem consistent with public policy that they do so. The public policy to this same effect was stated by this Court in the dissent in *Bowles* v. *Mahoney*, 91 U.S. App. D.C. 155, 202 F. 2d 320 (1952), wherein Judge Bazelon advocated that a presumptive burden be placed upon the owner of premises with reference to conditions thereon, and in *Bailey* v. *Zlotnick*, 80 U.S. App. D.C. 117, 149 F. 2d 505 (1945), this Court held that the owner had a non-delegable duty not to create unsafe conditions on his owned premises. See also, *Fisher* v. *Whetzel*, 108 U.S. App. D.C. 385, 282 F. 2d 943 (1960), in which this Court consistently held the owner liable for failure to comply with the building code, even after he had leased the entire premises to

another. Public policy considerations in this case would seem to require that the owner be held primarily responsible and they certainly are not inconsistent with an award of indemnity in favor of an intermediary lessee-lessor which never actually had occupancy or possession of the premises. Certainly so long as the plaintiff is protected, this Court is free to resolve the issues between the defendants on the basis of common law principles of indemnity. *Rishtig* v. *R & S Properties,* 101 A. 2d 254 (Munic. Ct. App. D.C. 1953).

Since the transcript demonstrates conclusively that the trial court's finding of fact that "There is no direct evidence as to who created the condition . . . ." is clearly erroneous, this Court should disregard it. The evidence demonstrates that this bricked portion of the building was built by the Toomeys immediately prior to 1931 when this Georgia Avenue and V Street property was first leased by them to operators for service station purposes. When they built that stairwell providing access to a sub-ground level storage room, they failed to provide either guard rail or cover and thereby created a situation which a court and a jury has found to be a nuisance. That condition, according to the law applied by the trial court, exposed all subsequent possessors to potential liability even though from the record it is clear that none of them changed the situation from that which existed since the time of creation. As between the defendants Sinclair and Toomey there is a definite difference in relative guilt. The Toomeys actually built the stairwell and actively created the situation which for a long time potentially caused harm and which eventually actually caused harm. The Sinclair Refining Company was merely guilty of non-feasance in that it failed to rebuild that portion of the station before it in turn leased the property to defendant William T. Muldrow for actual operation as a service station and thereby failed to remedy the condition which had been previously created by the Toomeys. Both the trial court and the jury have found

that all three defendants are liable to the injured plaintiff. This Court should now inquire into the relative delinquency of the parties defendant and award indemnity in favor of the Sinclair Refining Company.

CONCLUSION

The quest for a well ordered scheme of justice is not ended by the decision that all possible tort feasors are responsible to the injured plaintiff. In this case each bore a different relationship to the overall transaction, each had different obligations, powers and forms of control and each had different degrees of guilt. There is not reason why the courts should not inquire into the relative delinquency of the defendants and administer justice between them even though they are all wrongdoers. The Supreme Court of the United States decreed that such inquiry is consistent with the proper policy of the law. The denial of Sinclair's claim for indemnity in this particular case was not a decision on the merits. Instead it represented a view of the trial court which conflicts with the applicable authorities and proper judicial considerations and should therefore be reversed.

Respectfully submitted,

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JOINT APPENDIX

INDEX TO JOINT APPENDIX

Excerpts from Pleadings and Transcripts Docketed in United States District Court

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,736

SINCLAIR REFINING COMPANY, *Appellant*

v.

JAMES C. TOOMEY AND JOHN J. TOOMEY, Trustees under the Estate of Ellen C. Toomey, deceased, *Appellees.*

JOINT APPENDIX

On Appeal from the United States District Court for the District of Columbia

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1876-'59

VIRGINIA WARREN, Sheraton Park Hotel, 2660 Connecticut Avenue, N. W., Washington, D. C., *Plaintiff*,

v.

1. JAMES C. TOOMEY, Trustee u/w Ellen C. Toomey, deceased, 910 17th Street, N. W., Washington, D. C.

2. JOHN J. TOOMEY, Trustee u/w Ellen C. Toomey, deceased, 1015 15th Street, N. W., Washington, D. C.

3. SINCLAIR REFINING COMPANY, a corporation, 401 Farragut Street, N. W., Washington, D. C.

4. WILLIAM T. MULDROW, t/a Muldrow's Auto Service 706 V Street, N. W., Washington, D. C.

5. RADIO FLASH CAB ASSOCIATION, INC., a corporation, 448 New York Avenue, N. W., Washington, D. C.,
Defendants.

Filed July 10, 1959

Complaint for Personal Injury

1. This Court has jurisdiction of this case under Section 11-306 of the District of Columbia Code, because it is a civil action in which the amount in controversy exceeds $3,000, exclusive of interest and costs.

* * * * * * * * * *

6. The defendants, or one or more of them, on the night of June 12, 1958, and for a period of time previous to that date but of unknown duration, negligently maintained an unlighted and unguarded stairwell on the west side of the building at 706 V Street, N. W., leading down from the ground level to a basement office. The said stairwell was immediately adjacent to a public alley. The defendants and each of them knew, or in the exercise of reasonable

judgment and care should have known that said stairwell in said condition and location constituted an unreasonable danger to persons lawfully passing in the vicinity of said stairwell.

7. Because of the said negligence of the defendants, or of one or more of them, plaintiff fell into said stairwell on the night of June 12, 1958, while lawfully and with reasonable care passing near said stairwell, and was injured in said fall, as set forth below.

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Answer of Sinclair Refining Company to Complaint and Cross-Claims Against Defendants James C. Toomey, John J. Toomey and William T. Muldrow

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SECOND DEFENSE

1. Defendant, Sinclair Refining Company, admits that it entered into a lease agreement with James C. Toomey and John J. Toomey, as substituted trustees of the Estate of Ellen C. Toomey, deceased, lessors, on September 13, 1956, and thereby became lessees of a certain portion of the premises at 704-706 V Street, N. W.

2. It further admits that on December 5, 1957 it subleased those premises to William T. Muldrow. Any decision with reference to the relationship of the parties defendant 1, 2, 3 and 4 will have to be made with reference to the terms of the lease agreements executed under the dates aforesaid.

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4. Defendant, Sinclair Refining Company, denies that there was any defective or dangerous condition maintained on the premises. It further denies that plaintiff was injured by reason of negligence attributable to it or by reason of any breach of duty on its part. It further denies each and every other material allegation of the complaint which is not herein specifically answered.

THIRD DEFENSE

The injuries and damages sustained, if any, were the result of the sole or contributory negligence of the plaintiff, Virginia Warren.

CROSS-CLAIM AGAINST DEFENDANTS, JAMES C. TOOMEY AND JOHN J. TOOMEY, TRUSTEES

The accident which forms a basis for plaintiff's claim allegedly occurred in the District of Columbia on premises designated as 706 V Street, N. W., on June 12, 1958, when plaintiff fell into a stairwell which according to the allegations of the complaint "constituted an unreasonable danger to persons lawfully passing in the vicinity of said stairwell." Defendant, Sinclair Refining Company, denies the plaintiff's allegations. However, if the accident occurred as alleged and for the reasons asserted, it was caused or contributed to by the negligence and carelessness of defendants James C. Toomey and John J. Toomey, or their agents, servants or employees, who, as owners of the property, were responsible for the construction of the premises, the structural condition of the premises, and the maintenance thereof. If the defendant, Sinclair Refining Company by virtue of its relationship to the plaintiff, or any of the parties herein, is held liable for all or any part of the injuries allegedly sustained, such liability will have been caused or contributed to by the aforesaid negligence of the defendants James C. Toomey and John J. Toomey. By virtue of the negligence aforesaid and by virtue of the relationship between the defendants Toomey and this defendant and of the contractual provisions of the lease entered into on September 13, 1956, those defendants are or may be answerable over to this defendant for all or a contributable portion of any sums which may be adjudged in favor of the plaintiff against the Sinclair Refining Company in this action.

WHEREFORE, defendant, Sinclair Refining Company, demands judgment against defendants James C. Toomey and

John J. Toomey for all or a contributable portion of any sum which may be adjudged in favor of plaintiff against Sinclair Refining Company in this action together with interest, costs and all other further and proper relief in the premises.

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Answer of William T. Muldrow to Plaintiff's Complaint

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6. This defendant admits that there was a stairway at the east end of the building at 706 V Street, N. W., leading from the ground level to a basement; that the top or ground level of said stairway was close to a public alley, on the west thereof. This defendant denies that said stairway was unlighted. This defendant denies that said stairway constituted an unreasonable danger as alleged.

This defendant admits that said stairway was not enclosed by a railing or other guard but denies that under the circumstances and conditions prevailing at the time of plaintiff's alleged fall that said stairway constituted a danger, as alleged by plaintiff, and denies that it was the duty of this defendant, in any event, to erect a guard rail or other protective device on or about said stairway inasmuch as said stairway at the time of the grievances complained of in plaintiff's complaint was in the precise condition as when defendant took over said premises under the terms of its lease with defendant Sinclair which in turn was the lessee from the owner defendants Toomey. It was neither the obligation nor duty of this defendant to change or add to the structural condition of the premises as the same were received by this defendant.

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THIRD DEFENSE

This defendant denies that plaintiff sustained the fall and injuries as alleged in plaintiff's complaint by reason of any negligence on the part of this defendant and avers

(1) that plaintiff at the time of her alleged fall was a trespasser on the premises managed and operated as a gasoline station by this defendant; that said plaintiff was not an invitee on said premises, and (2) that said stairway at the time of plaintiff's alleged fall was adequately and properly lighted and readily observable to any person exercising reasonable care and lookout and that plaintiff's alleged fall was entirely the result of her own carelessness and negligence or negligence and carelessness on her part directly contributing to said fall.

* * * * * * * * * *

Answer of Defendants James C. Toomey and John J. Toomey, Trustees, to Plaintiff's Complaint

* * * * * * * * * *

Second Defense

These defendants admit jurisdiction of this court and admit that they were, on June 12, 1958, trustees under the will of Ellen C. Toomey, deceased, and as such were owners of premises 706 V Street, N. W. These defendants further admit that said premises were at such date by them then leased to defendant Sinclair Refining Company in and by virtue of a lease agreement dated September 13, 1956.

These defendants are without information, knowledge or belief concerning the alleged subletting of defendants' property but aver that subletting thereof was permitted in their lease agreement with defendant Sinclair Refining Company provided that the use or occupancy of the property of these defendants by any subtenant thereof would conform in every particular to the covenants contained in the lease between these defendants and defendant Sinclair Refining Company.

These defendants deny each and every allegation of negligence pertaining to them and deny that they were under any obligation to maintain the premises herein in

repair during the occupancy thereof by defendant Sinclair Refining Company or any subtenant.

These defendants further deny that the plaintiff herein suffered or sustained any injury upon any premises over which they had any active dominion or control insofar as maintenence is concerned and deny that plaintiff suffered or sustained any injury by reason of any negligence attributable to them or by any breech of duty owed by them to plaintiff. Said defendants further deny each and every other material allegation of plaintiff's complaint not heretofore specifically answered.

Third Defense

These defendants aver that any injuries or damages sustained by plaintiff herein were as a result of her sole or contributory negligence.

Fourth Defense

These defendants aver that if plaintiff herein suffered or sustained any injuries upon the property allegedly owned by these defendants, that plaintiff's presence upon such premises was not as a result of any invitation of these defendants to plaintiff nor was the same for any purpose, use or business incidental to the ownership of said premises by these defendants and that any presence upon said premises by the plaintiff was for her own use and purpose as a result whereof plaintiff took said premises in the condition in which she found them and assumed for herself any and all injuries and damages which she might have sustained while thus upon said premises. These defendants aver that they were not in occupancy, use or active control of the premises at the time plaintiff allegedly sustained her injuries thereupon.

• • • • • • • • • •

Answer of Defendants James C. Toomey and John J. Toomey, Trustees, to the Cross-Claim of Defendant Sinclair Refining Company

Second Defense

For further defense to the cross-claim of Sinclair Refining Company against them, these defendants admit that they were lessors and that the cross-claimant was lessee of premises 706 V Street, N. W., but aver that by virtue of the lease agreement between these defendants and defendant Sinclair Refining Company any and all responsibility for the operation of a business upon said premises and for the maintenance of said premises in a suitable and satisfactory condition of repair was that of cross-claimant and not of these defendants and that accordingly if plaintiff suffered or sustained any injuries or damages in this action as a result of the use, occupancy or maintenance of premises 706 V Street, N. W., the sole responsibility is that of the cross-claimant and/or any subtenant to whom it may have sublet said premises and not of these defendants.

These defendants aver that their sole responsibility for the maintenance of the premises herein concerned was restrictd to the roof, walls and foundations of the premises erected at 706 V Street, N. W., and that all other maintenance therefor was the responsibility of cross-claimant and/or any of its subtenants.

Third Defense

For further defense to the cross-claim of Sinclair Refining Company against these defendants herein said defendants aver that as to any negligence claimed or alleged herein as to them, they were passive only and that in and by virtue of cross-claimant's obligations to these defendants in its use and occupancy of these defendants' premises that if any injuries were suffered or sustained by plaintiff, cross-claimant's negligence actively caused the same and

precludes any indemnity or contribution from these defendants.

• • • • • • • • • •

Filed January 31, 1962

Pre-Trial Order

Tort for personal injuries.

PLAINTIFF CLAIMS on June 12, 1958 at about 10:30 PM, following a night baseball game, the P, then 31 years of age, in company of an escort, was lawfully proceeding along a public alley running from V St. to Florida Ave., N.W., Wash., D.C. at the side of premises known as 706 V St., N.W. Said property was owned by the Ds James C. and John J. Toomey as trustees, was leased by D Sinclair Refining Co. from them, and in turn sub-leased to D William T. Muldrow.

• • • • • • • • • •

The P, while traversing the alley, fell in a stairwell of said premises and was injured as indicated below. The alley was immediately adjacent to the Ds' premises and there was no boundary, property line, fence or other instrument of division demarking the end of the public alley and the beginning of Ds' property.

P asserts that the accident, her injuries and damages were caused by the negligence of all the Ds in that they maintained an unlighted stairwell under circumstances reasonably requiring lighting; maintained an unguarded stairwell; maintained an uncovered stairwell immediately adjacent to a public way without notice or warning sign; failed to mark the dividing line between the public space and the Ds' property, so that those persons lawfully using the public way would be apprised of the dividing line, and thus be warned that apparently a part of the public way was not in fact maintained and fit for use as a public way; maintained a hazardous condition, constituting a latent and concealed defect, to wit, the stairwell.

• • • • • • • • • •

DEFENDANTS TOOMEY assert that they were, on and prior to the date in question, substituted trustees under the will of Ellen C. Toomey, deceased, and premises 706 V St., N.W., constituted an asset of said decedent's estate for which said Ds were trustees; on Sept. 13, 1956, these Ds leased premises in question together with other properties to D Sinclair Refining Co.; said lease was for 5 years and was outstanding and in effect on June 12, 1958, when P herein was allegedly injured; these Ds have no actual knowledge of the happening.

The lease between these Ds and Sinclair limited the use and occupancy of said premises to the sale of gasoline, oils, greases, tires, batteries, automobile repairs and provided that Sinclair might sublet for like purposes and subject to all convenants of the lease, that the lessee would make all repairs of any nature necessary to the premises excepting the roof, walls, foundations, sewer and water lines.

Full, complete control, supervision, operation and possession of the premises concerned was in either Sinclair Refining Company or one of its subtenants at the time of the alleged happening of which P complains.

These Ds deny any responsibility to P for any injury sustained by P upon Ds' premises, asserting that P was a trespasser, or at best a bare licensee taking the premises as she found them, that there was no active negligence on their part, that they were under no duty to maintain the premises nor did they have nor should they have had any notice of any dangerous or defective condition allegedly existing thereupon, and that said defendants were at the time of the happening neither in occupancy, use or active control of the premises.

These Ds further rely upon P's sole or contributory negligence in defense to this action, in that she walked down the alley around parked cars, failed to keep a proper

observance of conditions which existed and were there to be seen; walking fast. P was required to wear eye glasses because of an eye condition, and did not have them on at the time.

* * * * * * * * * *

DEFENDANT SINCLAIR REFINING Co. denies that complaint states a claim against it upon which relief can be granted because it owed P no duty and she was a trespasser. This D admits it entered into the lease agreement as claimed by Ds Toomey and admits it sub-leased the premises to the D. Muldrow on Dec. 5, 1957; asserts that any decision or interpretation made with reference to the relationship of the parties D must be made with reference to the specific terms of the lease agreements which speak for themselves; demands strict proof of the occurrence, P's status, injuries and damages claimed; denies any defective or dangerous condition maintained on the premises; denies any negligence, asserting that any injuries or damages sustained were the result of the sole or contributory negligence of the P adopting the specific allegations of Ds Toomey in this respect.

This D cross-claims against the Toomeys for the reason that under the allegations of the complaint it is alleged that the stairwell in question ". . . constituted an unreasonable danger to persons lawfully passing in the vicinity of the said stairwell." Ds Toomey as owners of the property were responsible for the construction of the premises, the structural condition of the premises and the maintenance thereof, and if by reason of these allegations any liability is imposed upon Sinclair Refining Co. by virtue of its relationship to P, such liability will have been caused or contributed to by the conduct of the Ds Toomey, which P alleges was negligent conduct. By virtue of such negligence, if proven, and by virtue of the relationship between the Ds Toomey and this D and of the contractual provisions of the lease, these Ds are, or may be answerable over

to this D for all or a contributable portion of any sum which may be adjudged in favor of P.

• • • • • • • • • •

DEFENDANT WILLIAM T. MULDROW admits that he was a sub-lessee of said premises at the time of P's fall and had been from Dec. 5, 1957 under a year-to-year lease; claims that the P, at the time of the happning of the incident complained of, was guilty of negligence directly contributed to her alleged fall and resultant injuries and damages, adopting the allegations of the Ds Toomey in this respect; denies that the said stairwell was unlighted and avers that the premises within the operation and control of this D were adequately and reasonably well lighted and that this D had no responsibility or obligation to light a public alley way or other areas; asserts that P was not a business invitee or guest at the premises managed and controlled by this D and that in going upon and walking upon said premises she was a trespasser; that said stairwell referred to in P's complaint was located upon private property and was not a hazard or danger to persons or the P lawfully in and upon and using said public alley; that he was not the owner of said premises and that he only occupied said premises as a sub-lessee under the lease before mentioned from D, Sinclair Refining Co; that under the terms and provisions of this lease, he had no right, duty or obligation to make alterations or changes as would be comprised in building or erecting guard railings or walls at the stairwell, where P's fall occurred; that the conditions existing at said stairwell at the time of P's alleged fall were exactly and precisely the same as at the time this D took over the occupancy of said premises under the aforesaid lease from Sinclair Refining Company; that Sinclair Refining Company, under the provisions of its lease above-mentioned, with the owners, Ds Toomey and Toomey, was directly responsible with Ds, Toomey and Toomey for the structural hazards of said premises, if any, including the involved stairwell, as may have caused any hazard to persons law-

fully in and upon the adjacent public ways and alley; that it was the obligation and legal duty of Ds, Toomey and Toomey, and Sinclair Refining Co. to make such alteration and structural changes as might be necessary, if any, to overcome and correct any hazard which existed and was dangerous to the P and others lawfully using the adjacent public ways and alley.

This D denies that the P was injured and damaged to the extent alleged in P's complaint.

* * * * * * * * * *

All of the Ds object to the P's claim that their negligence is predicated upon their "failure to mark the dividing line between the public space and the Ds property, so that those persons lawfully using the public way would be apprised of the dividing line, and thus be warned that apparently a part of the public way was not in fact maintained and fit for use as a public way", asserting that such claim was asserted for the first time at pretrial and this constitutes an amendment of the P's pleadings, which takes the Ds by surprise; that it is too late to advance this claim because of the statute of limitations.

* * * * * * * * * *

Proposed Findings of Fact and Conclusions of Law in Accordance With Rule 52, Federal Rules of Civil Procedure

* * * * * * * * * *

(3) Defendants James C. Toomey and John J. Toomey, Trustees, created or caused to be created a stairwell on said private property.

(4) On September 13, 1956 defendants James C. Toomey and John J. Toomey, Trustees, leased the premises to defendant Sinclair Refining Company pursuant to a written lease agreement of that date, which has been received in evidence.

(5) On December 5, 1957, after an intermediate sublease to another, defendant Sinclair Refining Company sub-

leased the premises to defendant William T. Muldrow, pursuant to a written agreement of that date, which has been received in evidence.

(6) That the stairwell existed from the time of its inception in the same condition, except for wear and tear, as it existed at the time of the accident.

• • • • • • • • • •

Opinion

Filed January 10, 1963

• • • • • • • • • •

Defendants, hereinafter referred to as the Toomeys, Sinclair and Muldrow, have filed a joint motion to enter judgments in their favor under Rule 50(b) Fed. R. Civ. P., or in the alternative for a new trial.

• • • • • • • • • •

Before the incident giving rise to this suit, plaintiff and her escort had attended a night baseball game. At the conclusion of the game they left the stadium where it was held, and proceeded toward a lot where plaintiff's escort had parked his automobile. Their route took them along a city street until they reached a public alley. At this point they turned from the sidewalk of this street into the alley. Automobles were being driven out of the alley from parking lots adjacent thereto. Pedestrians were walking into and in the alley in the direction of these lots. To avoid oncoming automobiles, plaintiff and her escort walked to their left in single file with plaintiff in the lead. They walked a short distance in the same direction when plaintiff, according to her testimony, again stepped to her left to avoid an automobile parked in their path. Thereafter, she took several steps forward, fell into a stairwell from the side thereof and was injured. The stairwell led from the alley to the basement of a building. The basement was used for storage purposes and above it was a building used in part as the office portion of a gasoline station selling Sinclair products. This station, including the open and

enclosed portion thereof, traversed the alley from the sidewalk of the street where plaintiff had turned into the alley to a point beyond where she fell. The gasoline station property and the alley were immediately adjacent to each other. The side of the building did not extend to the alley but was several feet back of it, thereby giving room for the stairwell. It was not covered, had no warning signs on it, and no guard rail above and at its side. There was evidence that there were two flood lights on a building across the alley, and evidence that it was dark, or very dark, where she fell. If the latter be the fact, no flood lights existed, or if they did, they were inadequate, or were unlighted. There was a raised coping extending several inches above the level of the ground at the side of the stairwell, but this was broken away in part. The stairwell had existed in the same condition for many years and long prior to the leaseholds hereinafter referred to.

* * * * * * * * * *

The owners of the property in question were the defendants Toomey. They were trustees of the estate of Ellen C. Toomey, who acquired the property at the turn of the century, and title had been vested in her and her trustees continuously since then. In the early thirties, the owners remodeled the property, the original building of which had been used as a Civil War prison, and converted it into a gasoline station, with the usual appurtenances of pumps, etc., and remodeled the old building into an office for the gasoline station and for other purposes.

* * * * * * * * * *

My view, therefore, is that the effort on the part of each defendant to throw the onus of blame on another cannot be sustained, and that each of the defendants is responsible for the maintenance of this public nuisance known to each and existing throughout, and long before, the term of the respective lease herein involved. Accordingly, I hold that

each is answerable, equally with the others for damages to a third person who was injured thereby.

* * * * * * * * * *

Filed January 30, 1963

Findings of Fact

Upon consideration by the Court of the respective cross-claims, the Court finds the following facts:

1. Before the jury was sworn in this case all parties stipulated that the Court determine the issues raised by the respective cross-claims.

2. Plaintiff sustained injuries and the jury found in her favor against each of the defendants.

3. Plaintiff sustained injuries while walking on private property owned by defendants Toomey and leased by them to defendant Sinclair Refining Company and subleased by Sinclair Refining Company to defendant William T. Muldrow.

4. The basis for her claim and verdict was the continued maintenance of a condition which was in the nature of a public nuisance, as more particularly set forth in the opinion of the Court filed herein and made a part hereof so far as relevant to the issues raised by the cross-claims.

5. This condition was maintained by all three defendants, and was in existence continuously from the date of, and long prior to, the lease from defendants Toomey to defendant Sinclair Refining Company, until the date of the accident. Said condition was obvious and known to all defendants.

Conclusions of Law

1. All defendants are joint tort-feasors in respect of injuries to plaintiff growing out of the continued maintenance of the condition complained of.

There is no direct evidence as to who created the condition and there is no primary or basic liability involved.

2. Here there is a common burden and responsibility in respect of which defendants stand equally, and which in equity and good conscience should be equally born.

3. The convenants in the leases on the subject of repairs referred to in said opinion do not require any one defendant to assume the entire burden of the damages herein or prevent contribution when the condition made the basis for the suit was maintained and permitted to exist by all and did not come into existence during the term of said leases.

4. Defendants Toomey are entitled to contribution from defendants Sinclair Refining Company and William T. Muldrow, as joint tort-feasors.

5. Defendant Sinclair Refining Company is entitled to contribution from defendants Toomey and from defendant William T. Muldrow, as joint tort-feasors.

6. Defendant Muldrow is entitled to contribution from defendants Toomey and from defendant Sinclair Refining Company, as joint tort-feasors.

/s/ David A. Pine
United States District Judge

Filed January 30, 1963

Judgment

Upon consideration of the cross-claims of the respective parties defendant herein, and pursuant to Findings of Fact and Conclusions of Law filed herein, it is by the Court this day of January, 1963,

ORDERED, that the following judgments be entered:

* * * * * * * * * *

4. That the cross-claim of defendant Sinclair Refining Company for indemnity against defendants James C. Toomey and John J. Toomey be denied and that the said cross-claim be and the same hereby is dismissed.

/s/ DAVID A. PINE
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 1876-59

VIRGINIA WARREN DALY, *Plaintiff*,

v.

JAMES C. TOOMEY, et al., *Defendant*.

Notice of Appeal

Notice is hereby given this 25th day of February, 1963, that defendant, Sinclair Refining Company, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of January, 1963 in favor of defendants James C. Toomey and John J. Toomey, Trustees, against said defendant, Sinclair Refining Company, on its cross-claim for indemnity.

JOHN P. ARNESS
John P. Arness,
Attorney for Defendant
Sinclair Refining Company

* * * * * * * * * *

Excerpts from Testimony of John J. Toomey

1 Q. State your full name, please. A. John J. Toomey.

Q. And you are the John J. Toomey who is one of the defendants in this suit, and is a trustee under the will of Ellen Toomey? A. Yes, sir.

Q. And as such own the property at Georgia Avenue and V Street, Washington, D. C. A. Yes, sir.

• • • • • • • • • • •

2 Q. How long is that—how long, rather, has that lubricating shed been there? A. Well, that was the first structure built. That was put up about 1929 or 1930.

• • • • • • • • • • •

4 Q. Mr. Toomey, part of that building that had the gas station itself on it is much older than 1930, isn't it—that big building? A. No, sir. Now, the building itself, the main building, if memory serves me correctly, was built as a new building.

They may have retained some of the former structure, but that was frame—

Q. Some of the former structure, the frame, as a matter of fact, was used during the Civil War, wasn't it? A. That's right. It was a prison.

Q. Yes. So we are talking now about a hundred years or more ago. A. That went back only about half way down the lot, though.

This lot runs from Georgia Avenue back to the alley.

Q. How long has that property been in the hands of the Toomey family? A. There I think my grandmother bought it at the turn of the century.

Q. So that all during the time when this stair well
5 was built, and all during the time you have maintained it, it has always been in your family? A. That's right.

Q. And over the years, not even back as long as five years ago, but 10 or 15 years ago, you had occasion to visit these premises frequently, didn't you? A. Yes, I did.

Q. And you saw the condition of the stair well as it has been exhibited to the other witnesses in this trial and the various pictures, on many occasions, didn't you? A. I would say that is correct, I noticed the stair well. I never paid too much attention to it.

Q. Now, since your visits were frequent, you must have known approximately when it was that this ledge became broken down, didn't you? A. Yes, sir.

Q. And all during the time you had it and all the time you have leased it to various people, you knew when you leased it to them that there wasn't any guard rail there, or anything to protect people from that stair well? A. That's correct.

Q. Now, how long has it been used as filling station premises? A. The first occupant was a mission station about 1931.

6 Q. And has it been used as a filling station ever since then? A. Ever since.

Q. By various lessees? A. Right.

Q. And it never has had a stair railing on it? A. No, sir.

* * * * * * * * * *

7 Q. Well, to your knowledge ever since that foundation has been there this stair well has been there connected to it, is that not right? A. Yes. Originally this was a central—or contained a central heating plant for the entire building, including the restaurants up front, and the apartments upstairs.

* * * * * * * * * *

Q. So your interest so far as this piece of commercial property is concerned goes even beyond the leasing of the filling station premises to the Sinclair Refining Company and Mr. Muldrow. It goes to the leasing of it to other people, too, isn't that so? A. You are referring to the entire property?

Q. Yes. A. Yes, sir.

Q. And the entire property—do I take it from the fact

that you have been seated here during the trial, as far as the Toomey interests are concerned, is under your active management? A. That is true, yes, sir.

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9 Q. Now, there is no question in your mind but that you are not about to fix up every conceivable thing that could possibly be fixed about that building in order to rent it? That is true, isn't it? A. That is true. It would cost too much today.

10 Q. Yes. So there are certain things that, even though they should be remedied and you would like to have them remedied, but because of cost factors you just haven't done it. Isn't that so? A. Well, actually today it is no longer a service station.

Q. All right. I am talking about a part from what it is used for, where there are certain things, we will say from the year 1955 up until the year 1958, which could have been done and which you would have done if it had not been for the expense factor? A. No, sir, that is not the only reason. We did what we were called upon to do whenever the lessee came down to us and whenever, in our opinion, it was part of our agreement, or obligation.

Q. And whatever you considered to be economically feasible? A. No, sir, because we felt obliged to do certain things.

Q. So you did those things that there was no getting out of, but you wouldn't do the things that there was some getting out of? That is correct, isn't it? A. Well, what do you mean by "getting out?"

Q. You used the word. You tell me? A. All right.

11 If in our opinion a certain change was required and in our opinion it was not justified under the terms of the lease, regardless of who the lessee was, we didn't do it.

Q. Right. A. But we didn't go up and volunteer to do things.

Q. And prior to 1956 and subsequently thereto by virtue of your capacity as trustee, you were the sole owner of these premises? A. The estate—yes, the two trustees and the surviving one earlier; right.

Q. So that as far as exercising any dominion over these premises and as an owner, you would exercise the total and exclusive judgment; isn't that correct? A. In which cases, sir?

Q. So far as exercising dominion over those premises as an owner. A. Well, there are no other owners to consider, if that is what you mean.

Q. So then you would exercise the exclusive judgment; isn't that correct? A. As far as ownership, yes, sir.

• • • • • • • • • • •

15 Q. Mr. Toomey, I think I had concluded most of the questions I had in mind asking you, but I would like to ask you just one other:

You told us that this property had been in the hands of the Toomey family for some time, and that this lubricating building was the first to be built? A. That is true. You see, the original buildings were frames, and before they were converted the lube shed was built; that's correct.

Q. And then subsequently this building that now has in it the opening into which the stairwell that is involved in this case goes, was constructed—afterward? A. That's right.

Q. And that was in the Toomey family hands at that time? A. Right.

16 Q. Except for wear and tear incident to the years, was that stair well in the same condition structurally at the time this accident in June of 1958 as it was when it was constructed? A. I would say so, yes, except for the condition on the side there.

• • • • • • • • • • •

Excerpts from Charge to Jury

This exception to the general rule of law is as follows: Where property is adjacent to a public highway, as is the case before you, and the occupant of the property maintains an excavation thereon, and also maintains a situation or condition where a reasonably prudent man might mistake the point where the highway ended and the private property began, the occupant of the property has a duty to take reasonable precautions to protect persons against falling into the excavation. In other words, if the occupant might reasonably have anticipated, as an ordinarily prudent person, that a reasonably prudent pedestrian, owing to the appearance of the place or the situation, might stray away from the highway in the belief that he was still on it and fall into the excavation, the occupant must take reasonable precautions to protect him against such a contingency.

I have used the word "occupant" in explaining this principle of law. But when this condition of the property has remained unchanged and was the same at the time of the accident as it was at the beginning of the term of the lease, and there is no dispute in this case from the evidence on this point, this principle of law, and the duty imposed thereunder, applies to the owner and intermediary lessor as well as to the occupant or tenant, provided you find that the property comes within the description I have just given you, that is, stated briefly again: a condition or situation where a reasonably prudent pedestrian might mistake where the alley ended and the private property began and stray away from the alley into the stairwell, and that this condition, so far as the Toomeys and the Sinclair Refining Company are concerned, remained unchanged during the term of the lease to Sinclair Refining Company, namely, September 1956 to the date of the fall of plaintiff into the stairwell.

However, if you should find that this condition comes within this description I have given you, and further find

that reasonably adequate safeguards were provided by artificial lighting, and conclude that these safeguards were nullified by a failure to cause the lighting fixtures or some of them to be lighted on the occasion in question, defendants Toomey and Sinclair Refining Company would not be responsible, because the control of the lighting fixtures was in the hands of defendant Muldrow, who would be responsible for turning the lights on and off, and not under the control of the Toomeys and the Sinclair Company.

• • • • • • • • • • •

13 You are instructed that the defendant, Sinclair Refining Company, as lessor of the filling station premises involved, is not responsible for any acts of negligence committed by the defendant, William T. Muldrow, in the active and everyday operation of the premises which he as an independent operator entered into under his lease with the defendant, Sinclair Refining Company.

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18 Mr. Arness: On behalf of the defendant Sinclair, Your Honor, I renew the objections previously made.

The Court: You mean you renew the prayers?

Mr. Arness: I renew the objections and I also renew the prayers which were offered and which were rejected by the Court.

I have one further matter, Your Honor, of some concern. Under Your Honor's charge, if this jury should find that the condition described was maintained, they would

19 have to find all of the defendants liable except that if they should find it was due to the failure to light, they could find defendant Muldrow only.

Now, it is not clear, you have not stated, and under Your Honor's instructions the jury might feel that they could hold the defendant Sinclair without holding the defendant Muldrow. I do not think that that is possible under Your Honor's charge. I think any such verdict

would be inconsistent, because if they find the condition the plaintiff maintained at the time of the accident they would have to hold Muldrow along with Sinclair. I don't think that was spelled out to the jury.

• • • • • • • • • •

20 The Court: What is your position?

Mr. Ryan: I concur now with Mr. Arness's position.

The Court: When I read those essential elements, I said were applicable to each, unless I stated otherwise. The first element was that the defendant maintained an excavation in the form of a stairwell. The second was that the defendant maintained near and adjacent to the excavation a condition or situation from which a reasonably prudent person might mistake the boundary of the alley, that is, where the alley ended and the private property began, and might mistakenly stray away from the alley in the belief that he was still on it and fall into the stairwell, and that this condition existed during the term of the Sinclair
21 lease until the fall of the plaintiff, so far as the Toomeys and the Sinclair Refining Company are concerned.

Didn't I make the distinction there?

Mr. Arness: Yes, on that particular point.

The Court: That is the reason I put that in.

Mr. Arness: Well, Your Honor, I think that any verdict against the defendants Toomey and Sinclair and in which the defendant Muldrow were not held would be an inconsistent verdict under Your Honor's charge.

The Court: I think it would.

• • • • • • • • • •

Excerpts from Further Instructions to the Jury

12 Therefore, if your verdict is against either the Sinclair Refining Company or the Toomeys, it necessarily must be against all three of them because the only possible way it could be against Muldrow and in favor of the Toomeys and the Sinclair Refining Company would be

if you should find that there were artificial lighting facilities which were nullified by a failure to cause the lighting facilities, or some of them, to be lighted.

Therefore, if your verdict is based on the exception to the general rule, which I have given you, then your verdict should be against all three; but if your verdict is only against the one who failed to turn on the lighting fixtures, if one did fail to turn them on, then in that case only could it be against Muldrow individually.

BRIEF OF APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,736

SINCLAIR REFINING COMPANY,

Appellant,

v.

JAMES C. TOOMEY and JOHN J. TOOMEY,
Trustees under the will of
Ellen C. Toomey, Deceased,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY L. RYAN, JR.
815 15th Street, N. W.
Washington 5, D. C.

Attorney for Appellees.

STATEMENT OF QUESTIONS PRESENTED

Is a tenant entitled to indemnity or contribution from its landlord for damages awarded one who was a stranger to both for injuries sustained as a result of a nuisance upon the demised premises which had existed many years prior to the letting of the premises and which was thereafter continued in its pre-existing condition by the tenant when the lease agreement obliged the tenant to make all repairs of any nature to the demised premises, except some of a nature not involving the nuisance, and further when there was evidence of a possible concurring cause for which the tenant rather than the landlord would be liable?

The trial court held the tenant to be entitled to contribution upon the evidence and not indemnity and appellees concur.

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TABLE OF CASES

TEXT

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* Cases chiefly relied upon herein.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,736

SINCLAIR REFINING COMPANY,

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JAMES C. TOOMEY and JOHN J. TOOMEY,
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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEES

COUNTER-STATEMENT OF THE CASE

On June 12, 1958, plaintiff below, then Virginia Warren and now Virginia Warren Daly, was injured when she fell into a stairwell located adjacent to a public alley along side of premises 706 V Street, N. W., Washington, D. C. The stairwell was on property owned by the Estate of Ellen C. Toomey, deceased, for which estate, appellees, James C. Toomey and John J. Toomey are trustees, and which property was then leased to appellant, Sinclair Refining Company (JA 2).

She contended that the stairwell was immediately adjacent to a public alley in which she was lawfully proceeding and that there was no boundary, property line, fence or other instrument marking the end of the alley and the beginning of the private property (JA 9).

She further contended that she was caused to fall into the stairwell so situate because appellant and appellees each maintained an unlighted stairwell under circumstances reasonably requiring lighting; maintained an unguarded stairwell; maintained an uncovered stairwell immediately adjacent to a public way without notice or warning sign and thereby maintained a hazardous condition (JA 9).

Appellees cross-claimed against appellant seeking indemnity from appellant against any recovery allowed plaintiff against appellees upon their contention that under their lease agreement, appellant was obliged to make all repairs of any nature necessary to the premises excepting the roof, walls, foundations, sewer and water lines. They further claimed that full, complete control, supervision, operation and possession of the premises was vested in the appellant. Alternatively they claimed contribution (JA 10).

Appellant similarly cross-claimed against appellees, alleging that they "were responsible for the construction of the premises, the structural condition of the premises, and the maintenance thereof," seeking indemnity either because of the claimed negligence of appellees or contractually under their lease. Alternatively appellant sought contribution (JA 11, 12).

Neither appellant's cross-claim, its pretrial statement, nor the finalized pretrial statement upon which the trial ensued made any claim that appellees constructed the stairwell into which plaintiff fell. Accordingly the statement contained in appellant's brief (Br. 2) upon which its entire appeal is in fact pitched, "that those defendants constructed, * * * the condition complained of by plaintiff * * *," is without support in any pleading in the case.

The case proceeded to trial by jury upon plaintiff's claims as to all defendants including appellant, and by the court alone on the cross-claims between appellant and appellees; upon the evidence adduced in the presentation of plaintiff's case and any further evidence presented by the cross-claimants (JA 16).

After trial the jury returned a verdict in favor of the plaintiff against all defendants and the Court, in turn, entered its judgment denying indemnity against appellees but awarding contribution. Appellant has appealed herein from so much of the Court's judgment as denied its claim for indemnity (JA 18).

SUMMARY OF ARGUMENT

The plaintiff in the action below was awarded judgment against appellant, appellees and a third defendant upon a verdict of a jury.

Cross-claims were tried by the court upon substantially the same evidence as was offered to support plaintiff's claim against the appellant and appellees. The relationship which existed between appellant and appellees at the time the plaintiff was injured was that appellant occupied commercial property owned by appellees as a tenant of the same.

The court below found that there was a stairwell upon the premises which was not covered, had no warning signs upon it, no guard rail above it and at its side, and a raised coping part of which was broken away. It further found that these conditions had existed long prior to the lease and thereafter continuously until the date of the accident to plaintiff.

It further found evidence of two flood lights on a building across the alley from the stairwell and evidence that it was dark, or very dark where plaintiff fell, from which it concluded either that no flood lights existed, or if they did, they were inadequate, or were unlighted.

The appellant has urged herein that in addition to the foregoing, the court should have found as a fact affirmatively, that appellees

constructed the inadequate stairwell and thereby became and remained primarily and actively negligent and accordingly liable to indemnify appellant, it being at all times allegedly only passively negligent.

Appellees in reply to these contentions rely upon the following positions.

FIRST. Appellant did not at any time allege or plead that appellees built, erected or constructed the stairwell, nor was such an issue incorporated in the pretrial proceedings.

SECOND. The trial court declined to find affirmatively from the evidence that appellees did in fact build or cause the stairwell to be built, and unless this was clearly erroneous, it is not subject to appeal.

THIRD. There existed concurring conditions which the court found may have all combined to have caused plaintiff's injury. Appellant had the sole obligation to have made repairs relating to at least two of them, namely the broken coping and inadequate lighting if the same existed.

FOURTH. There existed no implied covenant of condition or fitness of the demised premises from appellees to the appellant, and it became appellant's duty upon leasing the same to place them in compliance with all valid regulations having regard to health and safety and further for appellant's own use, even though that use be only as an outlet for its products, or for re-rental to one of its retail distributors.

Appellees do not concede that the establishment of the construction of the stairwell by them or their privies in interest even if proven, would convert their obligation herein to appellant from one of contribution to one of indemnity.

ARGUMENT

Appellant's position herein is that appellees created a nuisance as a result of having constructed upon premises owned by them and leased to appellant, an open and unguarded stairwell into which plaintiff fell and was injured. It accordingly argues that having constructed the stairwell, appellees are primary wrongdoers, and that they having leased the premises to appellant with the same existing upon the premises at the time of the lease remained primary wrongdoers, while appellant although it was fully cognizant of the condition of the same and never took any steps to make it safe was nevertheless a passive wrongdoer entitled to be fully indemnified from any damage resulting to anyone injured because of the situation.

Appellees' response to this claimed liability is varied. They first urge upon this Court that this contention would appear to be an afterthought of appellant, conceived when it was reasonably apparent to all concerned that all defendants, appellant as well as appellees, were likely to be held jointly liable to the plaintiff.

Why an after-thought? Neither appellant's answer, its cross-claim, its pretrial statement, nor the formalized court pretrial statement signed by it, asserted any claim that appellees "constructed" the stairwell. On the contrary the words chosen by appellant then were that appellees "were responsible for the construction of the premises" and thus the condition complained of by the plaintiff. There was no specificity of the stairwell.

The reason for this is obvious. Appellant leased premises from the appellees which were old, very old, and known to be old. Appellant wanted to support a position that would make appellees appear responsible to appellant for <u>any condition</u> existing at the inception of its possession of the property under its renewal lease thereof to obscure any responsibility or liability on its part, although appellees submit the law in this jurisdiction is to the contrary.

It should be clear that if appellant had intended to charge appellees with having built the stairwell, they would have alleged that appellees were "responsible for having constructed the stairwell," or "for having built the stairwell," or perhaps "for having erected the stairwell." Only the stairwell was in issue.

The allegation as posed by appellant that appellees were "responsible for the construction of the premises" meant only the physical condition of the premises existing after their total completion and at the time of the lease and did not mean responsibility for the erecting or constructing of an isolated part of the same. "Construction" is a noun meaning a thing built, a structure. "Construct" is a verb, meaning to build, to erect.

Appellees accordingly submit that no genuine issue of having in fact physically built or erected, or having caused to be built or erected the premises involved, or certainly the stairwell was raised by the pleadings herein and that the issue so posed now, can not be raised here.[1]

Assuming, without conceding that such issue was properly raised and considered by the court, appellees are now told that the court was in error when appellant requested the court to make a finding of fact that, "Defendants James C. Toomey and John J. Toomey, Trustees, created or caused to be created a stairwell on said private property," and said court refused so to find.

Instead the court made the following findings:

> "4. The basis for her claim and verdict was the continued maintenance of a condition which was in the nature of a public nuisance, as more particularly set forth in the opinion of the court filed herein and made a part hereof so far as relevant to the issues raised by the cross claims." (Emphasis added)

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[1] Meadow Gold Products Co. v. Wright, 108 U.S. App. D.C. 33, 278 F. 2d 867; Conlon v. Tennant, 110 U.S. App. D.C. 340, 289 F. 2d 881.

> "5. This condition was maintained by all three defendants, and was in existence continuously from the date of, and long prior to, the lease from defendants Toomey to defendant Sinclair Refining Company until the date of the accident. Said condition was obvious and known to all defendants." (Emphasis added) (JA 16).

The court specifically made no finding as to by whom, or when the condition was in fact created. Instead it stated, as its conclusion of law, "There is no direct evidence as to who created the condition and there is no primary or basic liability involved" (JA 17).

Appellant contends that these findings of fact are clearly erroneous and contrary to the court's own written opinion. No specific reference is made to wherein the written opinion is at variance. Appellant seems to base its claim to clear and incontrovertible error upon its interpretation of the testimony of appellee, James C. Toomey, who was the only witness called to testify in any respect concerning the history of origin of the premises and its condition prior to being leased to the appellant. Again no testimony is quoted with specificity, only a summarization to suit appellant's contention is set forth.

Based upon Mr. Toomey's testimony, appellant has stated in its brief that, "The stairwell was built when the new building was constructed." Appellees submit that this is an illogical and strained interpretation to place upon Mr. Toomey's testimony.

Such testimony indicated that historically some "of the former structure" was used as a prison during the Civil War (JA 19). The property itself came into the Toomey family around the turn of the century. Mr. Toomey believed that "the main building" was not much older than 1930. However what was old building, what was frame building, what was retained in remodeling and specifically when the stairwell was constructed and by whom was never shown. The only fair implication would appear that insofar as appellees knew it had always existed during their family ownership. Mr. Toomey's testimony was as follows:

"Q. How long has that property been in the hands of the Toomey family?

"A. There I think my grandmother bought it at the turn of the century.

"Q. So that during all that time when this stairwell was built, and all during the time you have maintained it, it has always been in your family?

"A. That's right" (JA 19).

No further testimony adduced from Mr. Toomey added any clarity to when the stairwell had been built or by whom, and appellees therefore rely upon the well established law pertaining to this jurisdiction that unless the findings made by the trial court are clearly erroneous or are not supported by the evidence they will not be disturbed on appeal. It is submitted that the appellant has wholly failed to meet this test.[2]

All other salient factors relating to the landlord and tenant relationship were discussed factually in the trial court's memorandum opinion and appellant has agreed in its brief herein that they are not in dispute. In this connection the aforesaid memorandum indicated that the following were causes or conditions leading to plaintiff's injury.

"The side of the building did not extend to the alley but was several feet back of it, thereby giving room for the stairwell. It was not covered, had no warning signs on it, and no guard rail above and at its side. There were two flood lights on a building across the alley, and evidence that it was dark, or very dark, where she fell. If the latter be the fact, no flood lights existed, or if they did, they were inadequate, or were unlighted. There was a raised coping extending several inches above the level of the ground at the side of the stairwell, but this was broken away in part. The stairwell had existed in this same condition for many years prior to the leaseholds hereinafter referred to." Daly v. Toomey, 212 F. Supp. 475. (JA 15).

From the foregoing facts found by the trial judge and included in his memorandum, we find three situations which could have separately or collectively and jointly caused plaintiff's injury.

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[2] United States v. Yellow Cab Company, 338 U.S. 338.

1. The open, unguarded stairwell without warning signs.

2. Darkness, caused either by absence of flood lights, inadequacy thereof, or because they were not lighted.

3. A broken coping at the side of the stairwell.

Unless on the record herein appellees, as landlords, were liable directly to appellant, as their tenant for either the creation or maintenance of each condition noted above, they could not be liable to appellant for indemnity because the court below, without specificity indicated that in its opinion all of the conditions could have been causes. This is supported in law.[3]

Since plaintiff's injury was sustained at night when leaving a ball game and the scene of the happening was allegedly dark, or very dark, it seems obvious that lack of flood lights or not having the same lighted, if in fact they existed, is certainly a condition over which these appellees had no control and for which they could not be primarily liable to this appellant. By the same token such a condition would have equally obviously concurred with the condition of the stairwell existing upon appellees' premises in causing plaintiff's injuries since in darkness the condition might not be discernible, and certainly any warning sign would not have been visible.

In reaching a determination of liability inter se between appellant and appellees as landlord and tenant respectively, the trial court started with the premise that a landlord does not by renting his premises to another discharge himself from responsibility to third persons for injury sustained from a nuisance existing on the premises at the time of the letting. 32 Am. Jur. 641. The mere continuing existence of the nuisance created liability on the appellees without regard to who initially created the condition.[4]

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[3] Nordstrom v. District of Columbia, 213 F. Supp. 315.

[4] Hilleary v. Earle Restaurant, Inc., 108 F. Supp. 829.

Between themselves, as landlord and tenant, the situation then becomes crystal clear. In this jurisdiction when injury occurs to a third person because of the negligence of the tenant to make repairs becoming necessary after leasing the premises when the lease requires the tenant to make repairs, the tenant alone is responsible and liable to the injured party. Bowles v. Mahoney, 202 F. 2d 320; Security Savings & Commercial Bank v. Sullivan, 261 F. 461.

Accordingly if the appellant herein was obliged to make repairs or to maintain the premises during its leasehold thereof, it was also liable to plaintiff if it failed so to do, independent of appellees' obligation based upon the initially existing nuisance. Both failures to meet respective obligations concurred in creating and causing the basis of plaintiff's injury and both parties are equally liable.

The trial court stated in its opinion that except for the repairs to the roof, walls, foundations and underground sewer and water lines which are not involved herein, "all other repairs of any nature were to be made and paid for by Sinclair." This determination was based upon the language of the lease, and it obviously meant repairs to a broken coping, or to the malfunctioning lights, if either of such continued after, or started after the commencement of the term.

Since admittedly the condition of the stairwell, regardless of who built it or when, is also involved between appellant and appellees, appellees herein assert that it is the well established law of this jurisdiction that the appellant took appellees' premises as it found them, and without any implied covenant that the same were in good repair, or even fit for its intended and expressed intended uses. Further when appellant agreed "that all other repairs of any nature" would be made and paid for by appellant, it was obliged to, but failed to, make and pay for such repairs as "were needed at the time to render the building fit for its ordinary uses, in compliance with all valid regulations having regard to health and safety." Keroes v. Richards, 28 App. D.C. 310.

The obligations required in compliance with the above, required appellant to put appellees' premises initially in a state of repair and to keep them so. Failing this, which admittedly it did, appellant should be indemnifying appellees, rather than the reverse which appellant claims to be entitled herein. In this jurisdiction, unless a landlord specifically agrees so to do, he is under no obligation to put the demised premises in a better condition than the same were when leased. Kaufman v. Clark, 7 D.C. 1.

CONCLUSION

Appellees herein submit that from the record filed herein it is well established that the plaintiff below, a stranger to both appellant and appellees, was injured as a result of a cause or causes for which all parties herein concerned should be deemed equally liable inter se, as well as to said plaintiff, and that accordingly it would be unjust and most inequitable that one alone, whether it be appellant or appellees should bear the entire burden. The judgment awarding contribution and denying indemnity to the appellant should accordingly be affirmed.

Respectfully submitted,

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